

# Personal Jurisdiction After *Asahi Metal Industry Co. v. Superior Court of California*

## I. INTRODUCTION

The Supreme Court decision in *Asahi Metal Industry Co. v. Superior Court of California*<sup>1</sup> is not primarily a pronouncement on and clarification of personal jurisdiction and the minimum contacts test. Instead, the Court confronted the issue of the reasonableness of judicial jurisdiction over foreign defendants. Applying the minimum contacts test which the Court has developed in primarily domestic cases, the Supreme Court was divided on the minimum contacts issue. The Justices unanimously agreed, however, that assertion of jurisdiction over the defendant under the conditions of the case was unreasonable.

This Case Comment examines the relationship of the *Asahi* case to past, present, and future concepts of personal jurisdiction. Section II presents a brief overview of the evolution of personal jurisdiction. The discussion in Section III first focuses on the facts and holding of the case (Part A). Part B of Section III then analyzes the Court's complex voting pattern in *Asahi*. This part considers the Court's application of the threshold issue of minimum contacts as well as the Court's determination of the fair play and substantial justice (reasonableness) issue. Section IV examines the implications of the *Asahi* decision for future applications of the minimum contacts standards (Part A) and for international law cases (Part B). Conclusions are set forth in Part V. The final part of this Case Comment considers an apparently broadening view of personal jurisdiction, the confusion in the lower courts as to the true significance of the *Asahi* decision, and the Supreme Court's missed opportunity to address the issue of personal jurisdiction in international cases.

## II. DEVELOPMENT OF PRINCIPLES OF PERSONAL JURISDICTION

The modern view of jurisdiction<sup>2</sup> developed from *International Shoe Co. v. Washington*,<sup>3</sup> a 1945 decision in which the Supreme Court established the "minimum contacts" test.<sup>4</sup> That test had fairness and reasonableness as its ends with a consideration of the defendant's contacts with the forum state as a means to those ends.<sup>5</sup> The Court's new due process standard for personal jurisdiction required only

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1. 107 S. Ct. 1026 (1987).

2. For comprehensive discussions of the evolution of personal jurisdiction doctrine in the Supreme Court, see J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE*, sec. 3 (1985); C. WRIGHT, *THE LAW OF FEDERAL COURTS*, sec. 64 (1983); Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411 (1981); Silberman, Shaffer v. Heitner: *The End of an Era*, 53 N.Y.U. L. REV. 33 (1978).

3. 326 U.S. 310 (1945).

4. *Id.* at 316. Chief Justice Stone wrote, "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

5. *Id.* at 316-17.

that the "demands [of due process] may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."<sup>6</sup>

The use of the term *minimum contacts* to describe the requirements of due process suggested to some an approach that focused attention on assessing the defendant's physical connection with the state.<sup>7</sup> A second approach emphasized the fairness of requiring a defendant to defend this suit in this forum. Under this second approach, while the defendant must have some contact, tie, or relation to the forum state, it need not be a physical act or even an event that the defendant caused.<sup>8</sup> Language in *International Shoe* lends support to this broader fairness interpretation and strongly suggests that the Court was concerned less with contacts and more with fair play and substantial justice:

It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. . . . Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.<sup>9</sup>

In 1957, the Supreme Court decided *McGee v. International Life Insurance Co.*<sup>10</sup> in a manner consistent with its approach in *International Shoe*. The Court seemingly endorsed the fairness view and rejected the notion that due process requires physical contact to justify jurisdiction.<sup>11</sup> On the basis of a single contract between a California resident and a Texas insurance company, the Supreme Court found it reasonable for California to assert jurisdiction over the Texas insurance company.<sup>12</sup> The Court stressed the forum's strong interest in protecting its citizens,<sup>13</sup> the plaintiff's interest

6. *Id.* at 317.

7. R. CASAD, JURISDICTION IN CIVIL ACTIONS, sec. 2.02[4][b] (1983) [hereinafter R. CASAD]. See, e.g., *Aaron Ferer & Sons Co. v. American Compressed Steel*, 564 F.2d 1206 (8th Cir. 1977); *Pennington v. Toyomenka, Inc.*, 512 F.2d 1291 (5th Cir. 1975); *Hydraulics Unlimited Mfg. Co. v. B/J Mfg. Co.*, 323 F. Supp. 996 (D. Colo. 1971), *aff'd*, 449 F.2d 775 (10th Cir. 1971); *Oklahoma Publishing Co. v. National Sportsmen's Club, Inc.*, 323 F. Supp. 929 (W.D. Okla. 1971); *Saletko v. Willys Motors, Inc.*, 36 Ill. App. 2d 7, 183 N.E.2d 569 (1962); *White v. Goldthwaite*, 204 Kan. 83, 460 P.2d 578 (1969); *Latham v. Ryan*, 373 So. 2d 242 (La. Ct. App. 1979); *Tyee Constr. Co. v. Dullen Steel Prods., Inc.*, 62 Wash. 2d 106, 381 P.2d 245 (1963).

8. R. CASAD, *supra* note 7, sec. 2.02[4][b]. See, e.g., *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220 (6th Cir. 1972); *Kourkene v. American BBR, Inc.*, 313 F.2d 769 (9th Cir. 1963); *Thermal Insulation Sys., Inc. v. Ark-Seal Corp.*, 508 F. Supp. 434 (D. Kan. 1980); *Jack O'Donnell Chevrolet, Inc. v. Shankles*, 276 F. Supp. 998 (N.D. Ill. 1967); *Phillips v. Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966); *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

9. *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

10. 355 U.S. 220 (1957).

11. R. CASAD, *supra* note 7, sec. 2.02[4][d].

12. The Texas insurance company maintained no offices or sales staff and did no continuous business in California. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 221 (1957).

13. California had adopted a statute authorizing service of process on nonresident insurance companies. *Id.* at 223.

in a convenient forum and ready availability of witnesses,<sup>14</sup> and little inconvenience for the defendant.<sup>15</sup>

By 1958, the Supreme Court's view of the underlying due process restrictions on personal jurisdiction and the minimum contacts test underwent a significant shift in emphasis.<sup>16</sup> The Court's decision in *Hanson v. Denckla*<sup>17</sup> called into question the continued validity of the *McGee* holding that a single contract satisfied the minimum contacts test. In *Hanson*, the Court refused to allow Florida to assert jurisdiction over a Delaware trustee. The trustee's only contact with Florida was that the deceased creator of the Delaware trust moved to Florida and exercised power of appointment over the trust while living there.<sup>18</sup> The Court rejected the contention that Florida was the "center of gravity" of the dispute and was therefore a fair and reasonable forum.<sup>19</sup> No court may assert jurisdiction over a nonresident defendant, the Court emphasized, unless the nonresident has "purposefully availed" himself or herself of the "benefits and protection" of the forum state.<sup>20</sup>

By the time of its 1980 decision in *World-Wide Volkswagen v. Woodson*,<sup>21</sup> the Supreme Court had clearly articulated its *International Shoe* standard as a two-step analysis.<sup>22</sup> The Court stated that determination of personal jurisdiction begins with consideration of whether a nonresident defendant had minimum contacts such that the defendant "purposefully availed" himself or herself of the benefits and protection of the forum state.<sup>23</sup> If a defendant could reasonably foresee being "haled into court" in the state, that foreseeability was evidence of purposeful availment.<sup>24</sup> Only if minimum contacts are present should the reasonableness and fairness of the forum's assertion of jurisdiction be considered.<sup>25</sup> Relevant to this determination of reasonableness and fairness are the interests of the forum and plaintiff as well as the potential burden on the defendant.<sup>26</sup>

Discussion concerning *reasonableness* consumes only two paragraphs of the *World-Wide Volkswagen* opinion. The remainder is devoted to the second part of the minimum contacts test: ensuring that states respect the prerogatives of other sovereigns. *World-Wide Volkswagen* clearly indicates that these federalism considerations supersede the concerns of convenience of the forum and interest of the forum in trying the case.

Justice Brennan's dissenting opinion in *World-Wide Volkswagen* contended that the majority focused too "tightly" on contacts between the defendant and the

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14. *Id.* at 223.

15. *Id.* at 224.

16. Stephens, *The Single Contract as Minimum Contacts: Justice Brennan "Has It His Way,"* 28 WM. & MARY L. REV. 89, 92 (1986) [hereinafter Stephens, *Single Contract*].

17. 357 U.S. 235 (1958).

18. *Id.* at 238, 252.

19. *Id.* at 254.

20. *Id.* at 253.

21. 444 U.S. 286 (1980).

22. *Id.* at 291-92.

23. *Id.* at 297.

24. *Id.*

25. *Id.* at 294.

26. *Id.* at 292.

forum.<sup>27</sup> “In so doing, they accord,” he argued, “too little weight to the strength of the forum State’s interest in the case and fail to explore whether there would be any actual inconvenience to the defendant.”<sup>28</sup> The Court ignored, Brennan claimed, the “essential inquiry” of *International Shoe*—the question of “fair play and substantial justice.”<sup>29</sup> Rejecting the majority’s defendant focus, Justice Brennan advocated an approach that would find satisfaction of jurisdictional requirements when “the forum State has an interest in permitting the litigation to go forward, the litigation is connected to the forum, and the burden of defending is not unreasonable.”<sup>30</sup>

The Court’s subsequent 1982 decision in *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*<sup>31</sup> contained language that suggested a retreat from its emphasis on “interstate federalism” in *World-Wide Volkswagen*. In a footnote to the majority opinion, Justice White qualifies his own language in *World-Wide Volkswagen*:

The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns.<sup>32</sup>

Although interstate federalism is an important federal constitutional concern, the due process clause of the fourteenth amendment does not address that concern. The purpose of the due process clause is to protect persons against unfair or arbitrary treatment at the hands of the government.<sup>33</sup> If the due process standard of *International Shoe* makes it fair to adjudicate in the court of one state, then the interests of interstate federalism, embodied in the full faith and credit clause of article IV of the Constitution, will be served by requiring that all states give effect to that state’s judgment.<sup>34</sup>

In *Burger King Corp. v. Rudzewicz*,<sup>35</sup> Justice Brennan wrote the majority opinion which reflected his previously expressed concerns that the minimum contacts test was outdated and that emphasis on defendants was unnecessary.<sup>36</sup> Brennan arguably moved the Court toward a more multifactored analysis, which considers contacts of all aspects of the litigation to the forum as well as the reasonableness of asserting jurisdiction based on those contacts.<sup>37</sup> Echoing his contentions in his dissent in *World-Wide Volkswagen*, Brennan stated that a showing of contacts creates a presumption of reasonableness that the defendant must overcome in order to resist the forum’s assertion of personal jurisdiction.<sup>38</sup> One commentator has suggested that the Court has adopted an approach that emphasizes fairness and reasonableness of the

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27. *Id.* at 299 (Brennan, J., dissenting).

28. *Id.* at 299–300.

29. *Id.* at 300.

30. *Id.* at 302.

31. 456 U.S. 694 (1982).

32. *Id.* at 703 n.10.

33. R. CASAD, *supra* note 7, sec. 2.04[2][e].

34. *Id.*

35. 471 U.S. 462 (1984).

36. See *supra* notes 27–30 and accompanying text.

37. Stephens, *Single Contract*, *supra* note 16, at 117.

38. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 483–85 (1984).

forum and the interests of all the parties, the forum, and the judicial system itself. The defendant's connection with the forum state is merely a prerequisite for jurisdiction, a prerequisite that is easily met. Even a tenuous relationship of the defendant with the forum state would be sufficient if the forum were fair and reasonable.<sup>39</sup>

With this background of personal jurisdiction, the *Asahi* decision can now be examined.

### III. ASAHI METAL INDUSTRY CO. v. SUPERIOR COURT OF CALIFORNIA: FACTS, HOLDING, AND ANALYSIS

#### A. Facts and Holding

Asahi Metal Industry Co., Ltd., (Asahi) manufactured tire valve assemblies in Japan and sold them to several tire manufacturers, including Cheng Shin Rubber Industrial Co. (Cheng Shin), for use as components in tire tubes. Asahi's sales to Cheng Shin occurred in Taiwan, and Asahi shipped the tire valve assemblies from Japan to Taiwan. Cheng Shin incorporated the assemblies into its finished tires, which Cheng Shin sold, among other places, in the United States. Asahi was aware that the valve assemblies sold to Cheng Shin would end up in California. In an affidavit, a manager of Cheng Shin whose duties included purchase of component parts stated that he would have discussed with Asahi the fact that Cheng Shin's tubes were sold throughout the world and specifically in the United States. On the other hand, the president of Asahi declared in an affidavit that Asahi had never contemplated that sales to Cheng Shin in Taiwan would subject it to lawsuits in California.<sup>40</sup>

A California resident brought a product liability suit in California Superior Court arising from a motorcycle accident allegedly caused by defects in a tire manufactured by Cheng Shin. Cheng Shin filed a cross-complaint for indemnification from Asahi. After settlement of the main suit, the Superior Court denied Asahi's motion to quash Cheng Shin's service of summons. Both the trial court and the California Supreme Court ruled that personal jurisdiction over Asahi was authorized by California's long-arm statute<sup>41</sup> and Asahi had to defend the action in California.<sup>42</sup> The Supreme Court of the United States disagreed in a complex voting pattern.<sup>43</sup>

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39. See generally Stephens, *Single Contract*, *supra* note 16.

40. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. 1026, 1029-30 (1987).

41. CAL. CIV. PROC. CODE § 410.10 (West 1973) states: "A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States."

California's long-arm statute subjects nonresidents to jurisdiction on the ground of their transacting business in the state. It is necessarily more restrictive in its application than a "single act" statute, since the nonresident must have more contacts with California in order to come within statutory limits. Courts have equated "doing business" with such minimum contacts with the state such that the maintenance of a suit does not offend traditional notions of fair play and substantial justice. California courts have recognized that "doing business," as used in the California statute, does not require repeated and successive transactions in California. See, e.g., *Long v. Mishicot Modern Dairy, Inc.*, 252 Cal. App. 2d 425, 60 Cal. Rptr. 432 (1967) (stating that where the cause of action arises out of economic activity courts have held that contacts need not consist of repeated or continuous business transactions). California courts have also recognized that in some situations a single transaction within the state may render the nonresident amenable to process. See, e.g., *Long v. Mishicot Modern Dairy, Inc.*, 252 Cal. App. 2d 425, 60 Cal. Rptr. 432 (1967); *Eclipse Fuel Eng'g Co. v. Superior Court of San Francisco*, 148 Cal. App. 2d 736, 307 P.2d 739 (1957).

42. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1031.

43. *Id.* Justice O'Connor announced the judgment of the Court and delivered the opinion for a unanimous Court

## B. Analysis

*Asahi Metal Industry Co. v. Superior Court of California*<sup>44</sup> presented the Supreme Court with the opportunity to address the amenability of a Japanese component part manufacturer to jurisdiction in California, where the defendant had no direct contacts.<sup>45</sup> A unanimous court reversed the California state court's exercise of personal jurisdiction over the foreign defendant.<sup>46</sup> Writing for the court, Justice O'Connor declared that the mere awareness of a foreign defendant that the components that it manufactured, sold, and delivered outside the United States would reach the forum state in the stream of commerce did not constitute minimum contacts. Exercise of personal jurisdiction would be inconsistent with the notions of fair play and substantial justice.<sup>47</sup>

The Supreme Court applied the minimum contacts test, which the Court has interpreted as serving two functions:

The concept of minimum contacts . . . can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system.<sup>48</sup>

First, the Court examined Asahi's contacts with the forum state to determine if they were sufficient to satisfy due process. *World-Wide Volkswagen* clearly indicates that the limitations imposed by the notions of sovereignty are of threshold importance.<sup>49</sup> These concerns prevail over forum convenience and forum interests.<sup>50</sup> The *World-Wide Volkswagen* Court referred to the due process clause as an "instrument of interstate federalism" and stressed that jurisdiction may be defeated however minimal the burden of litigating or however strong the interest of the forum state.<sup>51</sup> Second, even if the Court found minimum contacts, the Court inquired whether the exercise of jurisdiction over Asahi would be fair and reasonable.<sup>52</sup>

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with respect to Part I (the facts of the case); an opinion of the Court with respect to Part II-B on reasonableness and fairness of the exercise of jurisdiction, in which Chief Justice Rehnquist and Justices Brennan, White, Marshall, Blackmun, Powell, and Stevens joined; and an opinion with respect to Parts II-A on minimum contacts and III (the holding), in which Chief Justice Rehnquist and Justices Powell and Scalia joined. Justice Brennan filed an opinion concurring in part and concurring in the judgment, in which Justices White, Marshall, and Blackmun joined. Justice Stevens filed an opinion concurring in part and concurring in the judgment, in which Justices White and Blackmun joined.

44. *Id.*

45. Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689, 761-62 (1987).

46. Graydon Staring, counsel for Asahi Metal Industry Co., Ltd., has claimed that this was the first unanimous decision of the Supreme Court finding no personal jurisdiction since the ruling in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Stewart, *Shortening California's Long Arm*, 73 A.B.A. J. 45 (1987) [hereinafter, Stewart, *Long Arm*].

47. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1035.

48. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291-92 (1980).

49. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1031-33.

50. *Id.* See also Jay, "Minimum Contacts" as a Unified Theory of Personal Jurisdiction: A Reappraisal, 59 N.C.L. REV. 429, 438 (1981) [hereinafter Jay, *Minimum Contacts*].

51. *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 294 (1980).

52. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1031.

1. *Due Process Analysis*a. *Part II-A of the Plurality Opinion*

In Part II-A of the Court's plurality opinion, Justice O'Connor stated that Asahi's action did not constitute minimum contacts. The Chief Justice and Justices Powell and Scalia joined her in this part of the opinion. She began her analysis of the due process issue with a reaffirmance of the principle that the defendant's actions are the basis for finding minimum contacts.<sup>53</sup> Justice O'Connor stated that she was following the reasoning of *Hanson v. Denckla*<sup>54</sup> which indicated that minimum contacts had to have a basis in the defendant's purposeful availment of the privilege of conducting business or activities within the forum state.<sup>55</sup> She traced this line of reasoning from *International Shoe*,<sup>56</sup> in which Court reasoned:

[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.<sup>57</sup>

In support of her focus on the defendant's contacts, Justice O'Connor quoted from *Burger King*, the Supreme Court's most recent decision regarding personal jurisdiction.<sup>58</sup> However, the language that Justice O'Connor chose to cite consisted largely of quotations from the earlier *International Shoe*, *Hanson v. Denckla*, and *McGee v. International Life Insurance Co.* line of cases.<sup>59</sup>

Justice O'Connor then addressed how the Court in *World-Wide Volkswagen*<sup>60</sup> applied "the principle that minimum contacts must be based on an act of the defendant."<sup>61</sup> The *World-Wide Volkswagen* Court "rejected the assertion that a consumer's unilateral act of bringing the defendant's product into the forum State was a sufficient basis for personal jurisdiction over the defendant."<sup>62</sup> Justice O'Connor considered the problems of foreseeability and stream of commerce. *World-Wide Volkswagen* has been understood, she said, two ways:

Some courts have understood the Due Process Clause, as interpreted in *World-Wide Volkswagen*, to allow an exercise of personal jurisdiction to be based on no more than the defendant's act of placing the product into the stream of commerce. Other courts have understood the Due Process Clause and the above-quoted language in *World-Wide Volkswagen* to require the action of the defendant to be more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce.<sup>63</sup>

Justice O'Connor then presented a cursory review of lower court decisions that interpreted the concepts of stream of commerce and purposeful availment. She

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53. *Id.*

54. 357 U.S. 235 (1958).

55. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1031.

56. 326 U.S. 310 (1945).

57. *Id.* at 316.

58. 471 U.S. 462 (1984).

59. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1031.

60. 444 U.S. 286 (1980).

61. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1031.

62. *Id.*

63. *Id.* at 1032.

declared the first position, one with which the position of the Supreme Court of California was consistent, to be at odds with the requirements of due process. Jurisdiction required, Justice O'Connor stated, "[a]dditional conduct,"<sup>64</sup> an action of the defendant directed toward the forum state. On the basis of the facts presented in the case, Justice O'Connor reasoned that "the exertion of personal jurisdiction over Asahi by the Superior Court of California exceed[ed] the limits of Due Process."<sup>65</sup> Even if Asahi were aware that some of its component parts would end up in products sold in the United States, that awareness would not be enough. Asahi had not purposefully availed itself of the California market. Facts did not indicate that:

Asahi did business in California, had an office, agents or employees or property in California, advertised in California or otherwise solicited business in California. Moreover, it did not create, control or employ the distribution system that brought its valve assemblies to California. Nor was there any evidence that Asahi designed its product in anticipation of sales in California.<sup>66</sup>

b. *Justice Brennan's Holding on Minimum Contacts*

If Justice O'Connor was attempting to clarify the stream of commerce passage in *World-Wide Volkswagen* and its function in the minimum contacts analysis, a majority of the Justices did not agree with her position.<sup>67</sup> In his concurring opinion, Justice Brennan disagreed with both Justice O'Connor's interpretation of the stream of commerce theory and her conclusion that Asahi did not purposefully avail itself of the privileges of California.<sup>68</sup> Justices White, Marshall, and Blackmun joined in Justice Brennan's opinion about the minimum contacts issue.

Justice Brennan argued that Justice O'Connor endorsed the "minority view" of the stream of commerce theory that requires a more purposeful availment by the defendant.<sup>69</sup> Furthermore, the view "represent[ed] a marked retreat" from the Court's analysis in *World-Wide Volkswagen*.<sup>70</sup> Justice Brennan found no need for "[a]dditional conduct" beyond the placement of the product into the stream of commerce.<sup>71</sup> According to Justice Brennan, the stream of commerce is "the regular and anticipated flow of products from manufacture to distribution to retail sale."<sup>72</sup> If a business participant places goods in the stream of commerce, the possibility of a lawsuit cannot be a surprise to that participant. In addition, the litigation is not a burden for which the participant receives no corresponding benefit.<sup>73</sup>

Justice Brennan cited language in *World-Wide Volkswagen* that supported his

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64. *Id.* at 1033.

65. *Id.*

66. Griffin, *U.S. Supreme Court Offers Guidance on Assertions of Jurisdiction over Foreign Manufacturers*, 15 INT'L BUS. LAW. 196, 197 (1987). See *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1030-31.

67. Recent Development, *Foreign Manufacturer Not Subject to Domestic Jurisdiction in Absence of Minimum Contacts*, 22 TEX. INT'L L.J. 403, 407 (1987) [hereinafter Recent Development].

68. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1035 (Brennan, J., concurring).

69. *Id.* at 1036.

70. *Id.*

71. *Id.* at 1035.

72. *Id.*

73. *Id.*



position on minimum contacts. He stated that the reasoning of the Court in *World-Wide Volkswagen* was that a corporation who may reasonably anticipate litigation in a particular forum cannot claim that such litigation is unfair.<sup>74</sup> The corporation had the choice, as the Court in *World-Wide Volkswagen* stated, of insuring itself, passing expected costs on to consumers, or severing connections with the state.<sup>75</sup>

Justice Brennan pointed out that the *World-Wide Volkswagen* Court had cited with approval the holding in *Gray v. American Radiator & Standard Sanitary Corp.*<sup>76</sup> In *Gray*, the Illinois Supreme Court applied the stream of commerce theory and asserted jurisdiction over a component-parts manufacturer with no direct sales in Illinois but with sales to a manufacturer who incorporated the component parts into a final product that was sold in Illinois.<sup>77</sup> Justice Brennan asserted that the Court in *World-Wide Volkswagen* carefully distinguished cases in which a chain of distribution delivered the goods to the forum state from cases in which a consumer transported them to the forum state. In *Asahi*, Justice Brennan stated that the California Supreme Court had taken notice of this difference, correctly concluded that the holding in *World-Wide Volkswagen* preserved the stream of commerce theory, and found facts to support a finding of minimum contacts.<sup>78</sup>

### c. Justice Stevens's Holding on Minimum Contacts

In a concurring opinion, Justice Stevens, joined by Justices White and Blackmun, declined to reach the minimum contacts issue.<sup>79</sup> However, if the test of minimum contacts should have been formulated in the *Asahi* case, Justice Stevens stated that "Part II-A misapplie[d] it to the facts of this case."<sup>80</sup> In fact, Justice Stevens went on to state that "in most circumstances [he] would be inclined to conclude that a regular course of dealing" such as *Asahi* conducted "would constitute 'purposeful availment' " of California's market, even though the product was a standard one delivered world-wide.<sup>81</sup> Justice Stevens said that arguably *Asahi* had engaged in a higher quantum of conduct than merely placement of its product in the stream of commerce.<sup>82</sup>

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74. *Id.* at 1036. The *World-Wide Volkswagen* Court said:

[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is the defendant's conduct and connection with the forum State such that he should reasonably anticipate being haled into Court there.

*World-Wide Volkswagen v. Woodson*, 444 U.S. at 297.

75. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1036.

76. *Id.* at 1037 (Brennan, J., concurring).

77. *Id.*

78. *Id.* at 1037 (Brennan, J., concurring). See *infra* notes 108-18 and accompanying text.

79. *Id.* at 1038 (Stevens, J., concurring).

80. *Id.*

81. *Id.*

82. *Id.* Justice Stevens is referring to *Asahi's* regular course of dealing with *Cheng Shin* which resulted in deliveries of over 100,000 units per year over a period of years.

## 2. Part II-B of the Plurality Opinion: Fair Play and Substantial Justice

After addressing the due process component of minimum contacts, the Court considered the issue of the fairness and reasonableness of the exercise of jurisdiction over Asahi. Justice O'Connor delivered the opinion of the Court. Eight Justices<sup>83</sup> concurred in this section of the opinion, which was couched in language of "fair play and substantial justice."<sup>84</sup>

The Court purported to decide the case on the basis of the evaluation of a number of factors. These included the burden on the defendant, the interests of the forum state, the plaintiff's interests, and the states' interests in the most efficient resolution of controversies and the advancement of fundamental substantive social policies.<sup>85</sup> The Court evaluated these factors and found that the assertion of jurisdiction over Asahi would be unreasonable.<sup>86</sup>

The Court determined that the burden on the defendants was especially onerous. Asahi would have been forced to defend a contract action based on a Taiwanese contract in the judicial system of a foreign nation.<sup>87</sup> The Court stated, "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."<sup>88</sup>

The Court then discussed the other factors. The plaintiff, Cheng Shin, had not demonstrated that California was a more convenient forum for the litigation of its claim than Taiwan or Japan.<sup>89</sup> California had no clear interest in the dispute, since neither party resided in California and the dispute was about indemnity and not safety standards. Furthermore, it was not clear that California law would govern the dispute.<sup>90</sup>

The Court did not consider only the interests of the other states in the efficient resolution of the *Asahi* dispute and in policy advancement. Since *World-Wide Volkswagen* admonished courts to consider interests of the "several States" as well as the forum state, the *Asahi* Court felt itself obligated to also consider the procedural and substantive policies of other nations whose interests might be affected by a California court's assertion of jurisdiction.<sup>91</sup> The interests of those other nations as well as the federal interest in its foreign relations policies would be "best served by a careful inquiry into the assertion of jurisdiction" and by "an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum state."<sup>92</sup>

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83. Only Justice Scalia did not join in this section of the opinion.

84. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1033 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

85. *Id.* at 1034.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1035.

92. *Id.* at 1034-35.

## IV. IMPLICATIONS

A. *The Court's Approaches to the Analysis of Minimum Contacts*

Several relatively well-defined minimum contacts standards are available to the Court when it decides questions of personal jurisdiction. Each standard is applicable to a different subject matter or context. The Court in *Asahi* had available to it standards previously applied in precedential (or at least persuasive) decisions in contexts related to stream of commerce, product liability, component parts, and the international arena.

1. *Stream of Commerce*

Both Justice O'Connor and Justice Brennan stated that they were applying the stream of commerce analysis as set forth in *World-Wide Volkswagen*. However, they reached different conclusions.<sup>93</sup> Justice O'Connor found insufficient minimum contacts in a stream of commerce context where the defendant had no purposeful affiliation.<sup>94</sup> Justice Brennan based jurisdiction on the defendant's regular placement of the product in the stream of commerce, such that the defendant realized benefits sufficient to offset the burden of litigation.<sup>95</sup>

Significantly, Justice White, the author of the *World-Wide Volkswagen* decision, appeared to reconsider the requirement of purposeful action by a defendant to direct its product toward the forum state. The suggestion has been made that Justice White has retreated from *World-Wide Volkswagen*.<sup>96</sup> *World-Wide Volkswagen* placed a significant limit on the use of long-arm statutes in product liability suits against out-of-state manufacturers and vendors. Mere foreseeability that a product would enter the forum state was not enough to establish personal jurisdiction over an out-of-state manufacturer or vendor. The action of the defendant had to be more purposefully directed.<sup>97</sup> In *Asahi*, Justice White joined in Justice Brennan's concurring opinion and, thus, in his position that *Asahi's* placement of component parts into the stream of commerce, without more, was purposeful availment.

The Court's position on the stream of commerce theory, therefore, seems to have shifted to what Justice Brennan would term the majority view, the view that placement of goods into the stream of commerce without more is sufficient purposeful availment. Only three other Justices concurred with Justice O'Connor in her narrow reading of stream of commerce and purposeful availment. Five Justices indicated that a more expansive view of personal jurisdiction may prevail at the Supreme Court.<sup>98</sup>

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93. See *supra* notes 21-30 and accompanying text.

94. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1033.

95. *Id.* at 1035 (Brennan, J., concurring).

96. Stewart, *Long Arm*, *supra* note 46, at 46.

97. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

98. Stewart, *Long Arm*, *supra* note 46, at 45.

## 2. Product Liability

The Supreme Court has also distinguished among cases that deal with these types of subject matter:<sup>99</sup> product liability,<sup>100</sup> family law,<sup>101</sup> and contract disputes.<sup>102</sup> *World-Wide Volkswagen* should be consulted when the subject, as in *Asahi*, is a product liability action. The *World-Wide Volkswagen* holding means that for a state to be able to assert personal jurisdiction, the defendant corporation must have commercially benefitted from the forum contact or have sought a market in the forum.<sup>103</sup> As Justice Brennan pointed out, Justice O'Connor applied the *World-Wide Volkswagen* test without regard for the caveat in that decision that the *Gray* holding was proper in a component-parts context.<sup>104</sup> The Court in *World-Wide Volkswagen* determined that the defendant should be able to predict that he would be liable to suit in a particular forum and also be able to take measures to avoid that risk. However, the Court did not doom all product liability cases to dismissal from forums other than the place of manufacture or sale.<sup>105</sup> The Court explicitly sanctioned *Gray*, where the manufacturer had sold a defective component part to an intermediary who used it in the assembly of a final product.<sup>106</sup> Apparently, the Court distinguished *Gray* because the plaintiff-customer had not transported the product to the forum state. Instead, the component-parts manufacturer had placed its products into the stream of commerce and expected purchase by consumers in the forum state.<sup>107</sup>

## 3. Component Parts

Obviously, component-parts actions are a special subset of the product liability area. Justice Brennan took notice of this added dimension of the *Asahi* case and came up with a result different from that of Justice O'Connor. Justice O'Connor relied only on the *World-Wide Volkswagen* holding.<sup>108</sup> In *Asahi*, as in *Gray*, the sale of component parts to another manufacturer who incorporated those components into its products added an extra step to the distribution chain. The distinction between

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99. Pershbacher, *Minimum Contacts Reapplied: Mr. Justice Brennan Has It His Way in Burger King Corp. v. Rudzewicz*, 1986 ARIZ. ST. L.J. 585, 629-30 (1986) [hereinafter Pershbacher, *Minimum Contacts Reapplied*].

100. *Id.* at 629-30. Pershbacher says that if a question of personal jurisdiction arises in a product liability action, *World-Wide Volkswagen* should be consulted, "as it was in *Asahi*." *Id.* at 630. The defendant must have had a commercially beneficial forum contact or have sought a market in the forum state. Jurisdiction will be found, however, if the defendant knowingly causes intangible effects—even without any economic benefit to the defendant. See *Calder v. Jones*, 465 U.S. 783 (1984) (knowingly writing a news story about a California resident was sufficient to assert jurisdiction in California over nonresident reporter and editor who did not have commercially beneficial forum contact).

101. Pershbacher, *Minimum Contacts Reapplied*, *supra* note 99, at 630. *Kulko v. Superior Court*, 436 U.S. 84, *reh'g denied*, 438 U.S. 908 (1978), provides the test in a family law matter. In *Kulko*, jurisdiction was not available in a state where family members resided, if their presence resulted from a consensual agreement with a nonresident defendant.

102. Pershbacher, *Minimum Contacts Reapplied*, *supra* note 99, at 630. In a contract dispute, the sources of analysis are *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). Consensual agreements with residents will usually be sufficient to find jurisdiction over a nonresident.

103. *Id.*

104. See *supra* notes 76-78 and accompanying text.

105. Jay, *Minimum Contacts*, *supra* note 50, at 442-43.

106. *Id.* at 443.

107. *Id.* But the Court presumably knew that the record in *Gray* failed to show that any other of the defendant's products were in the forum.

108. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1034.

component-parts cases and regular product liability cases in the minds of the Court seems to be the degree of control exerted by the manufacturer. The component-parts manufacturer places his product into the stream of commerce of his own volition and for a financial benefit. Theoretically, the component-parts manufacturer can ascertain the destination of his product and make other arrangements if resultant multistate<sup>109</sup> jurisdictional exposure is objectionable.<sup>110</sup>

The more common situation seems to be the *Gray*<sup>111</sup> fact pattern. There, the defendant was uninformed as to the volume of its product in the forum and could not influence the distribution process.<sup>112</sup> The defendant in both types of cases—component-parts and regular product liability—seems to be at the mercy of another. The component-parts manufacturer is no less subject to the intervention of someone over whom he has little or no control than the regular manufacturer whose product may be removed to another forum by the purchaser. Furthermore, cases such as *Gray* do not turn on the degree of control exercised by the defendant over its product. The courts made a realistic appraisal of the modern economic system and the convenience of the parties and determined that the assertion of jurisdiction was reasonable under the circumstances.<sup>113</sup>

The judicial system has not, however, analogized component-parts actions and portable torts. It has afforded disparate treatment to component-parts actions as represented by *Gray* and to portable torts, which are injuries caused by products that the consumer/buyer transports to another forum, as illustrated by *World-Wide Volkswagen*.<sup>114</sup> Each of these kinds of cases is identical as far as the damaged plaintiff is concerned.<sup>115</sup> One commentator on personal jurisdiction, Professor Jay, points out the inherent unfairness:

Those who are hurt by products purchased in the forum clear the initial barriers to litigating at home and can rely on the "reasonableness" side of the minimum contacts standard. . . . Persons in the Woodsons' [the injured party in *World-Wide Volkswagen*] position must simply remain silent, despite the existence of any number of arguments that might establish their forum choice as an entirely fair one.<sup>116</sup>

Professor Jay also argues that the growth of long-arm jurisdiction in areas like product liability will have been for naught if the consumer cannot bring suit against the manufacturer in a forum convenient to the consumer. He states:

The great gains made by consumers through the expansion of substantive liability over the makers and sellers of defective goods would be effaced if the injured buyer could not afford

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109. "Multistate" is interchangeable with multi-national or international.

110. Jay, *Minimum Contacts*, *supra* note 50, at 444.

111. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961). *See also* *Buckeye Boiler Co. v. Superior Court*, 71 Cal. 2d 893, 458 P.2d 57, 80 Cal. Rptr. 113 (1969).

112. *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 442-43, 176 N.E.2d 761, 764 (1961).

113. Jay, *Minimum Contacts*, *supra* note 50, at 445.

114. Portable torts are those injuries that are caused by a product that the purchaser bought outside the forum and then transported into the forum. Any relationship between the manufacturer's forum state contacts and the particular product injury may be lacking. Problems in finding jurisdiction are especially evident when the product reaches a forum that is outside the normal chain of distribution of the manufacturer or a middleman.

115. Jay, *Minimum Contacts*, *supra* note 50, at 448.

116. *Id.*

the burden of suit. Given the physical distance between modern manufacturers/distributors and their ultimate buyers—a setup encouraged by business for economic advantage—the danger of uncompensated loss to the consumer is very real unless plaintiffs can compel the attendance of defendants in a reasonable forum.<sup>117</sup>

Justice Brennan's position, which was the majority position in *Asahi*,<sup>118</sup> would preserve for the customer/plaintiff the ability to litigate component-parts actions in a forum convenient to the customer/plaintiff. He made no inroads into the *World-Wide Volkswagen* holding regarding product liability cases in general. Justice Brennan did maintain the status quo in component-parts cases by finding sufficient minimum contacts by *Asahi*.

### B. *The International Context*

All the Justices agreed, however, that regardless of whether *Asahi* purposefully availed itself of the market in the forum state, California could not constitutionally exercise personal jurisdiction over *Asahi*. Notably, for the first time ever, Justice Brennan did not find personal jurisdiction.<sup>119</sup> With the exception of Justice Scalia, the entire Court concurred that personal jurisdiction simply would be unreasonable.<sup>120</sup> The critical consideration was the resolution of all other aspects of the lawsuit except for Cheng Shin's claim against *Asahi*.<sup>121</sup> The remaining claim was, after all, for indemnification of one foreign corporation by another foreign corporation.

#### 1. *The Supreme Court's Avoidance of the Issue of Jurisdiction in International Cases*

The Court said it decided the *Asahi* case on the bases of minimum contacts and personal jurisdiction. Nonetheless, the Court's reasoning in Part II-B of the plurality opinion indicated that the Court approached the case as a jurisdictional challenge by a foreign defendant. One writer has suggested that the case presents "a classic argument for forum non conveniens: two foreign parties, a foreign contract, foreign law presumably applicable, and all witnesses and exhibits (with the exclusion of the tire, which could easily be transported to Taiwan) in a foreign state."<sup>122</sup>

Professor Born, author of an article that advocates a special standard of judicial jurisdiction for international cases, believes that the Supreme Court has failed to provide guidance to lower courts for resolving jurisdictional challenges by foreign defendants. Most such challenges are grounded in part on the due process clause.<sup>123</sup> Only two prior Supreme Court decisions had involved due process challenges by

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117. *Id.* at 446.

118. See *supra* notes 68–70 and 79–82 and accompanying text about Justice White's concurring opinion as well as the three Justices who joined in Justice Brennan's concurring opinion.

119. Stewart, *Long Arm*, *supra* note 46, at 46.

120. Justice Scalia joined only the minimum contacts holding, but that alone would have defeated the exercise of jurisdiction.

121. Stewart, *Long Arm*, *supra* note 46, at 46.

122. Recent Development, *supra* note 67, at 409.

123. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 6 (1987) [hereinafter Born, *Reflections*]. Justice O'Connor cites to this article in her plurality opinion. See *supra* footnotes 87–92 and accompanying text.

foreigners to a state court's jurisdiction: *Perkins v. Benguet Consolidated Mining Co.*<sup>124</sup> and *Helicopteros Nacionales de Colombia v. Hall*.<sup>125</sup> In both cases, the Supreme Court applied the minimum contacts test developed in domestic cases and did not question the appropriateness of that test's usage in an international case.

In *Perkins*, the Supreme Court found general jurisdiction over a nonresident defendant in two actions for distribution of dividends and the issuance of stock certificates. The *Perkins* plaintiff sued in Ohio, although the defendant mining company was organized under laws of the Philippines. While the company's mining operations were suspended during World War II by the Japanese invasion of the islands, the president, who was the principal stockholder of Benguet, maintained an office in Ohio. The president did business on behalf of the company and kept company files in Ohio.<sup>126</sup> The Supreme Court held that jurisdiction was permissible over the nonresident defendant, even if the cause of action did not arise out of or relate to the business done in the state, provided that the defendant's contacts with the forum were "substantial"<sup>127</sup> or "continuous and systematic."<sup>128</sup>

In *Helicopteros*, the Supreme Court applied this "continuous and systematic" activities standard for claims not arising out of the defendant's in-state activities. The defendant was a Colombian corporation that provided helicopter transportation in South America for oil construction companies. It contracted with Consorcio to provide such services in connection with a pipeline in Peru. Plaintiffs filed wrongful death claims after Consorcio employees were killed when a helicopter supplied and piloted by the defendant crashed in Peru.<sup>129</sup> The Supreme Court held that the defendant's contacts with Texas did not constitute minimum contacts and the wrongful death claims did not arise out of the defendant's activities in the forum. The issue was whether the defendant's activities, which consisted mainly of purchases in the forum, were continuous and systematic. The Court held that they were not.<sup>130</sup>

Professor Born has concluded that international assertions of jurisdiction implicate special considerations—federal control over foreign relations and foreign commerce. These considerations require a modification of the traditional due process standards for application in international cases.<sup>131</sup> In addition, developments in foreign countries attest to an emerging principle of international law which requires that assertions of jurisdiction be *reasonable*.<sup>132</sup> Therefore, Professor Born proposes a standard of judicial jurisdiction in international cases that incorporates the dual considerations of federal control over foreign relations and foreign commerce and the reasonableness requirement. He recommends that:

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124. 342 U.S. 437 (1952).

125. 466 U.S. 408 (1984).

126. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447–48 (1952).

127. *Id.* at 447.

128. *Id.* at 445.

129. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 410–11 (1984).

130. *Id.* at 417.

131. Born, *Reflections*, *supra* note 121, at 20–34.

132. *Id.* at 20.

First, the level of constitutional scrutiny of jurisdictional claims should be raised in international cases. United States courts should use restraint in deciding jurisdictional issues in international cases, and jurisdiction over foreign defendants should be asserted only after a clear showing of a sufficiently close relationship to the United States to alert the defendant to the possibility of suit there. Second, the focus of constitutional analysis should be shifted in international cases. In state law international cases, the due process clause should require consideration of foreign defendants' national contacts, as well as their contacts with the forum state.<sup>133</sup>

Justifications for the stricter scrutiny are the prevention of friction with foreign sovereigns, avoidance of foreign retaliation or interference with United States foreign relations, and minimization of unfairness to individuals engaged in foreign commerce.<sup>134</sup> The due process clause must therefore impose two related requirements on assertions of judicial jurisdiction in international cases:

(1) United States courts should use particular caution in asserting long-arm jurisdiction over foreign defendants and (2) United States courts should require closer connections between the forum and the defendant than are necessary in domestic cases.<sup>135</sup>

Under a basic principle of international law, the separate identities of the individual states of the United States are irrelevant.<sup>136</sup> Therefore, as Professor Born states, "[f]oreign nations may properly complain when a United States court asserts jurisdiction over a national who has no reasonable connection to the United States."<sup>137</sup>

## 2. A Federal Standard for Jurisdiction over Alien Defendants: A National Aggregate Contacts Test

The Supreme Court in *Asahi* ignored the opportunity to provide a federal standard to decide issues of personal jurisdiction in the international context. It chose to continue its practice of using state standards of amenability to suit. Despite the failure of Congress to act in this area, or perhaps because of that failure, the Supreme Court refused to seize the initiative. In a footnote to the plurality opinion, Justice O'Connor wrote:

We have no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits.<sup>138</sup>

Other commentators and courts before Professor Born have recognized the alternative not considered by the Supreme Court in *Asahi*. The general assumption is that Congress, if it chose, could give the federal courts a nationwide range of personal jurisdiction. State boundaries, after all, have no particular significance for fifth

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133. *Id.* at 43.

134. *Id.* at 31-34.

135. *Id.* at 34.

136. *Id.* at 36.

137. *Id.* at 37 (emphasis in the original).

138. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1033 (emphasis in original) (citations omitted).



amendment due process.<sup>139</sup> Through a number of statutes dealing with special federal questions, Congress has provided for nationwide service of process. These statutes contain a federal standard of amenability, within which exists authorization for an aggregate contacts test in limited circumstances.<sup>140</sup> Cases have based jurisdiction on section 27 of the Securities Exchange Act of 1934,<sup>141</sup> federal admiralty laws,<sup>142</sup> and section 12 of the Clayton Act.<sup>143</sup>

Professor Thomas F. Green, Jr. first formulated an aggregate contacts test in 1961.<sup>144</sup> While maintaining the minimum contacts analysis of *International Shoe*, the aggregate contacts test does not limit the inquiry to contacts with the state in which the district court sits. The test considers all contacts throughout the United States. If sufficient contacts are found, the court exerts jurisdiction, even if the defendant lacks contacts with the forum.<sup>145</sup>

The Eastern District of Tennessee adopted the aggregate contacts test one year later in *First Flight Co. v. National Carloading Corp.*<sup>146</sup> In an action for damage to cargo against a foreign corporate defendant, process was served in accordance with the state's long-arm statute by virtue of Federal Rule of Civil Procedure 4(e). The court held that the federal court can consider the aggregate of a defendant's contacts with the United States, not with just the forum state.

Other courts have considered this test, and some have based jurisdiction on it.<sup>147</sup> In *Engineered Sports Products v. Brunswick Corp.*,<sup>148</sup> the District Court for the District of Utah considered a patent infringement claim against a European ski-boot manufacturer. Despite the defendant's claim of insufficient contacts with Utah, the court held that:

where, as here, suit is brought against alien defendants, the court properly may consider the aggregate presence of the defendant's apparatus in the United States as a whole. Due process or traditional notions of fair play should not immunize an alien defendant from suit in the United States simply because each state makes up only a fraction of the substantial nationwide market for the offending product.<sup>149</sup>

In *Centronics Data Computer Corp. v. Mannesmann*,<sup>150</sup> the District Court for the

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139. R. CASAD, *supra* note 7, sec. 4.06[5].

140. See generally Note, *Alien Corporations and Aggregate Contacts: A Genuinely Federal Jurisdictional Standard*, 95 HARV. L. REV. 470, 478-80 nn.48-53 (1981) [hereinafter Note, *Alien Corporations*].

141. See *Alco Standard Corp. v. Benalal*, 345 F. Supp. 14 (E.D. Pa. 1972); *Stern v. Gobeloff*, 332 F. Supp. 909 (D. Md. 1971); *Garner v. Enright*, 71 F.R.D. 656 (E.D.N.Y. 1976).

142. See *Engineering Equip. Co. v. S.S. Selene*, 446 F. Supp. 706 (S.D.N.Y. 1978), *cert. denied*, 454 U.S. 1164 (1982).

143. See *Superior Coal Co. v. Ruhrkohle*, 83 F.R.D. 414 (E.D. Pa. 1979).

144. Green, *Federal Jurisdiction in Personam of Corporations and Due Process*, 14 VAND. L. REV. 967 (1961) [hereinafter Green, *Federal Jurisdiction*].

145. See generally *id.*

146. 209 F. Supp. 730 (E.D. Tenn. 1962).

147. See *Coats Co. v. Vulcan Equip. Co.*, 459 F. Supp. 654 (N.D. Ill. 1978); *Engineering Equip. Co. v. S.S. Selene*, 446 F. Supp. 706 (S.D.N.Y. 1978); *Centronics Data Computer Corp. v. Mannesmann*, 432 F. Supp. 659 (D.N.H. 1977); *Cryomedics, Inc. v. Spemby, Ltd.*, 397 F. Supp. 287 (D. Conn. 1975); *Engineered Sports Prods. v. Brunswick Corp.*, 362 F. Supp. 722 (D. Utah 1973); *Holt v. Klosters Rederi A/S*, 355 F. Supp. 354 (W.D. Mich. 1973); *First Flight Co. v. National Carloading Corp.*, 209 F. Supp. 730 (E.D. Tenn. 1962).

148. 362 F. Supp. 722 (D. Utah 1973).

149. *Id.* at 728 (citation omitted).

150. 432 F. Supp. 659 (D.N.H. 1977).

District of New Hampshire found jurisdiction over a German corporation in an antitrust action.<sup>151</sup> The court held that "the fact that the defendant is an alien and that there is no other forum in which to litigate the claim should be taken into consideration in determining whether a finding of jurisdiction meets the requisite constitutional standards of fair play."<sup>152</sup>

Other federal courts have, however, rejected the aggregate contacts test. Arguably, the majority of them hold this view.<sup>153</sup> Except where Congress has specifically provided for nationwide service, most courts have declined to follow this approach.<sup>154</sup> Federal Rule of Civil Procedure 4(e) specifies that when service is made in accordance with a state long-arm statute or rule, service of the federal court's process can "be made under the circumstances and in the manner prescribed in the statute or rule."<sup>155</sup> Most federal courts have construed this to mean that a federal court that uses the state process for invoking jurisdiction is bound by the same limitations regarding the basis for jurisdiction as the state court would use.

The opinion of the District Court for the Southern District of Ohio in *Edward J. Moriarty & Co. v. General Tire & Rubber Co.*<sup>156</sup> illustrates this majority view. The court found jurisdiction under the Ohio long-arm statute in an antitrust action against a Greek defendant:

[W]e feel that the appropriate inquiry to be made in a federal court where the suit is based upon a federally created right is whether the defendant has certain minimal contacts with the United States. . . .

Unfortunately, this course has not been left open to us by the federal rules or statutes. That is, neither Congress nor the Supreme Court has provided statute or rule whereby substituted service may be made upon an alien corporation having certain minimal contacts with the United States. And when substituted service is made pursuant to a state long-arm statute, as it was in this case, then the rules provide that service be made "under the circumstances and in the manner prescribed in the statute. . . ."<sup>157</sup>

In two other cases, *DeJames v. Magnificence Carriers, Inc.*<sup>158</sup> and *Superior Coal Co. v. Ruhrkohle*,<sup>159</sup> the courts found that the defendants lacked minimum contacts and dismissed the actions. In *DeJames*, the District Court for the District of New Jersey found a Japanese corporation amenable to service in an action under admiralty laws only if the corporation had sufficient contacts with the forum state.<sup>160</sup> Service had been made under the New Jersey long-arm statute on the

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151. The court did not consider whether service had been made under the Clayton Act. See *supra* note 143 and accompanying text. If it had been, the court need not have resorted to the aggregate contacts test.

152. *Centronics Data Computer Corp. v. Mannesmann*, 432 F. Supp. 659, 664 (D.N.H. 1977).

153. Note, *Alien Corporations*, *supra* note 140, at 478.

154. See *Max Daetwyler Corp. v. Meyer*, 762 F.2d 290 (3d Cir. 1985), *cert. denied*, 474 U.S. 980 (1985); *Allen Organ Co. v. Kawai Musical Instruments Mfg. Co.*, 593 F. Supp. 107 (E.D. Pa. 1984); *Medeco Sec. Locks, Inc. v. Fichet-Bauche*, 568 F. Supp. 405 (D. Va. 1983).

155. Fed. R. Civ. P. 4(e).

156. 289 F. Supp. 381 (S.D. Ohio 1967).

157. *Id.* at 390 (quoting Fed. R. Civ. P. 4(e)) (emphasis in original).

158. 491 F. Supp. 1276 (D.N.J. 1980), *aff'd*, 654 F.2d 280 (3d Cir. 1981), *cert. denied*, 454 U.S. 1085 (1981).

159. 83 F.R.D. 414 (E.D. Pa. 1979).

160. *DeJames v. Magnificence Carriers, Inc.*, 491 F. Supp. 1276, 1279 (D.N.J. 1980), *aff'd*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981).

Japanese corporation that regularly did conversion work on American ships in Japan. In *Superior Coal*, the District Court for the Eastern District of Pennsylvania ruled similarly that jurisdiction could only be exerted if the defendants' contacts with the forum (Pennsylvania) met the minimum contacts test of *International Shoe*. The complaint in this antitrust action against West German producers of coal alleged an attempt to eliminate competition throughout the American coal market.<sup>161</sup>

### 3. Legislative Inaction and Judicial Deference

In the absence of congressional action, the majority of courts have declined to adopt the aggregate contacts test.<sup>162</sup> Courts continue to use state long-arm statutes that limit the full enforcement of federal law<sup>163</sup> and produce inconsistencies in jurisdictional results.<sup>164</sup> Instead of taking the lead and providing guidance, the Supreme Court has consistently put aside the issue of national contacts. While the Supreme Court may shy from issues of international relations that are raised by asserting jurisdiction over aliens, the Supreme Court should take advantage of the opportunity to contrast the superior power of the federal government with that of the states in the realm of personal jurisdiction.<sup>165</sup>

The Supreme Court in *Asahi* cites Professor Born's article in Part II-B of the plurality opinion that discusses the reasonableness of the assertion of jurisdiction over *Asahi*.<sup>166</sup> Obviously, the Court was aware of the relevance of the international context. Under a raised level of scrutiny of judicial jurisdiction in an international case, the Court in *Asahi* decided that the assertion of jurisdiction would be unreasonable.<sup>167</sup> Bowing to the paramount need for prudence in the international context, the Court dismissed the dispute in *Asahi* between foreign manufacturers.<sup>168</sup>

## V. CONCLUSION

The Court's decision in *Asahi* is not a clarification of any test for the assertion of personal jurisdiction. Indeed the highly unusual fact pattern in *Asahi* makes the decision's precedential value questionable and limited. Subsequent lower court

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161. If process had been served under the Clayton Act, the court was incorrect in finding no authorization for the aggregate contacts test. See *supra* note 143 and accompanying text.

162. See generally Note, *Alien Corporations*, *supra* note 140.

163. In federal cases, a trial may not be able to be held in its most appropriate location because the defendant has insufficient contacts there. See, e.g., *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 290 (3d Cir.) (Gibbons, J., dissenting) (arguing that New Jersey was the most appropriate location for trial in an admiralty action, despite the defendant's lack of minimum contacts with the state), *cert. denied*, 454 U.S. 1085 (1981).

164. Compare *Centronics Data Computer Corp. v. Mannesmann*, 432 F. Supp. 659 (D.N.H. 1977) (jurisdiction over German defendant in action alleging conspiracy to violate the antitrust laws based partly on New Hampshire long-arm statute) with *I.S. Joseph Co. v. Mannesmann Pipe & Steel Corp.*, 408 F. Supp. 1023 (D. Minn. 1976) (no jurisdiction under Minnesota law over the same defendant in action alleging same conspiracy).

165. Note, *Alien Corporations*, *supra* note 140, at 484.

166. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1033, 1035.

167. *Id.* at 1035.

168. See *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting) ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."). See generally Born, *Reflections*, *supra* note 123.

decisions arguably indicate confusion as to the present state of the standard for federal court jurisdiction.<sup>169</sup> To assess personal jurisdiction, lower courts have seized upon the two-step analysis of *Asahi*,<sup>170</sup> the five factors used to determine reasonableness of the exercise of jurisdiction,<sup>171</sup> and even the recognition of advertising in the forum state as an important contact factor.<sup>172</sup> One court seemed to ignore the more expansive view of purposeful availment and held jurisdiction was only proper if contacts with the forum state proximately result from actions of the *defendant himself* that create a substantial connection with the forum state.<sup>173</sup> In fact, when the Louisiana Supreme Court found jurisdiction over a nonresident manufacturer and distributor, the court exercised great care to distinguish *Asahi*.<sup>174</sup> The Missouri

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169. See, e.g., *Hall v. Zambelli*, 669 F. Supp. 753 (S.D. W. Va. 1987). A volunteer who was injured during a fireworks display sued the Japanese manufacturer of the fireworks. The District Court for the Southern District of West Virginia found that the defendant was subject to personal jurisdiction. One distinction between the case and *Asahi* that the court found significant was that Onda manufactured a finished product for sale to an identified customer in the United States. *Asahi* was a component-parts manufacturer. *Id.* at 756. Particularly insightful in the context of this Case Comment are the court's remarks regarding the law on personal jurisdiction:

The law on personal jurisdiction has not been cast in black and white simplicity since the Supreme Court's widely acclaimed decision in *International Shoe Co. v. Washington*. The Court's recent decisions, in particular *Asahi Metal Industry Co. v. Superior Court of California*, have muddled the waters further.

*Id.* at 754 (citations omitted) (emphasis added). See also *Ag-Chem Equip. Co. v. AVCO Corp.*, 666 F. Supp. 1010, 1015 (W.D. Mich. 1987) (after discussing the opinions in *Asahi*, holding that, "Until the Supreme Court resolves the debate as to what constitutes minimum contacts under the stream-of-commerce theory, it is incumbent upon this court to follow the lead of Justice Brennan and the Sixth Circuit.") (emphasis added).

170. See, e.g., *FDIC v. British-American Ins. Co.*, 828 F.2d 1439 (9th Cir. 1987) (citing Justice Stevens' concurring opinion that a finding of unreasonableness is a sufficient basis for defeating the exercise of personal jurisdiction); *Dupont Tire Serv. Center, Inc. v. North Stonington Auto-Truck Plaza, Inc.*, 659 F. Supp. 861 (D.R.I. 1987) (stating that according to *Asahi* there are two steps in the analysis); *State ex rel. Wichita Falls Gen. Hosp. v. Adolf*, 728 S.W.2d 604 (Mo. App. 1987) (saying that *Asahi* clearly establishes that the traditional notions of fair play and substantial justice language of *International Shoe* is a separate test related to, but not identical with, the minimum contacts test), *cert. denied*, 108 S. Ct. 292 (1987).

171. See, e.g., *Beary v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987) (finding the exercise of jurisdiction unreasonable, when the five factors are evaluated); *John Scott, Inc. v. Munford, Inc.*, 670 F. Supp. 344 (S.D. Fla. 1987) (analyzing five factors to determine if the assertion of jurisdiction transcended the fundamental precepts of due process); *Wallace v. Frank*, 662 F. Supp. 876 (E.D. Mich. 1987) (evaluating five factors of *Asahi* to determine reasonableness of assertion of jurisdiction); *Dupont Tire Serv. Center, Inc. v. North Stonington Auto-Truck Plaza, Inc.*, 659 F. Supp. 861 (D.R.I. 1987) (stating that the Supreme Court in *Asahi* held that a district court must consider five factors; finding that the strength of the forum's interest in protecting resident corporations and the more neutral character of the other four factors led to the conclusion that the assertion of jurisdiction would not be unreasonable); *Blue Ball Properties, Inc. v. McClain*, 658 F. Supp. 1310 (D. Del. 1987) (applying the five factors and finding assertion of jurisdiction unreasonable); *Marriage of Tiscornia v. Tiscornia*, 154 Ariz. 376, 742 P.2d 1363 (1987) (holding that the burden on the alien defendant outweighed minimal state interests); *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 736 P.2d 2 (1986) (examining the five factors and finding no personal jurisdiction when plaintiff, a Tennessee resident who was injured in car accident in Arizona and soon thereafter moved to Florida, sued his insurance company in Arizona, where the insurance company had no contacts). See also *A.I.M. Int'l, Inc. v. Battenfeld Extrusions Sys., Inc.*, 116 F.R.D. 633 (M.D. Ga. 1987) (emphasizing that in the analysis of the five factors to determine reasonableness of jurisdiction special care should be exercised in the international context); *Grange Ins. Ass'n v. State*, 49 Wash. App. 551, 744 P.2d 366 (1987) (evaluating *Asahi*'s factors, but balancing the burden on the defendant with the integrity of Washington's economy and the safety of its cities; stating that *Asahi* implies the latter should be weighed heavily in determining reasonableness).

172. See, e.g., *Poole and Kent Co. v. Equilease Assocs.*, 71 Md. App. 9, 523 A.2d 1018 (1987) (stating in dicta that the Supreme Court vacated and remanded *Camelback Ski Corp. v. Behning*, 307 Md. 270, 513 A.2d 874 (1986), *remanded*, 107 S. Ct. 1341 (1987), in light of *Asahi*, apparently because *Asahi* recognizes advertising in the forum state as an important contact factor); *McGowan Grain, Inc. v. Sanburg*, 225 Neb. 129, 403 N.W.2d 340 (1987) (finding sufficient contacts through purposeful direction of actions, including advertising).

173. *Batton v. Tennessee Farmers Mut. Ins. Co.*, 153 Ariz. 268, 736 P.2d 2 (1986).

174. *McBead Drilling Co. v. Kremco, Ltd.*, 509 So. 2d 429 (La. 1987). The *McBead* court said that the *Asahi* decision's plurality opinion discussed the requirement that the defendant's conduct be more purposefully directed at the forum than the mere placement of the product in the stream of commerce. The concurring Justices did not, however, subscribe to that requirement of a marked purposeful availment but did agree with the determination that exercise of

Appellate Court in *State ex rel. Wichita Falls General Hospital v. Adolf* found *Asahi* to have limited precedential value.<sup>175</sup> The *Wichita Falls* court believed *Asahi* made it clear that the minimal contacts required in the *product liability area* are less stringent than in other areas.<sup>176</sup>

The fact pattern and decision which perhaps illustrate the optimum utility of the *Asahi* holding is *Exxon Corp. v. Chick Kam Choo*.<sup>177</sup> In *Exxon*, the survivor of a shipwright killed in an accident in Singapore brought action against the owner and operator of the vessel in a Texas state court. A federal court had previously granted summary judgment on some claims and conditional dismissal on other claims on forum non conveniens grounds. The Fifth Circuit held that dismissal on forum non conveniens of an action by a federal district court precluded litigation of the same claim in a Texas state court located in the same city.<sup>178</sup> The court contended that federal foreign policy interests do not disappear when purely private foreign parties come to United States courts.<sup>179</sup> In a reference to *Asahi*, the court stated that even in the seemingly domestic setting of a third party indemnification complaint in a product liability case, the Supreme Court commanded a state court to rethink its analysis of personal jurisdiction in light of inherent foreign policy implications.<sup>180</sup> "In situation after situation," the court said, "Congress and the Supreme Court have made the availability of courts in the United States to foreign plaintiffs and against foreign defendants exclusively a matter of federal law, and they have consistently mandated self-restraint in asserting jurisdiction over arguably foreign disputes."<sup>181</sup>

The Fifth Circuit affirmed what the Supreme Court avoided in *Asahi*, namely the existence of a plenary power over international relations.<sup>182</sup> Federal law, the court

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jurisdiction did not comport with fairness and substantial justice. The *McBead* court said that clearly there was an insufficient relationship among the California forum, Japanese defendant, and litigation of an indemnity issue. *Id.* at 433. See also *Dittman v. Code-A-Phone Corp.*, 666 F. Supp. 1269 (N.D. Ind. 1987) (distinguishing *Asahi* from the defendant Japanese manufacturer who marketed a finished product and who had direct knowledge of the American market).

175. 728 S.W.2d 604 (Mo. App.), cert. denied, 108 S. Ct. 292 (1987).

176. *Id.* at 608.

177. 817 F.2d 307 (5th Cir. 1987), rev'd, 108 S. Ct. 1684 (1988). The Supreme Court considered the question of whether an injunction entered by the United States District Court for the Southern District of Texas was permissible under the Anti-Injunction Act, 28 U.S.C. § 2283, which generally bars federal courts from granting injunctions to stay proceedings in state courts. This injunction prohibited Chick Kam Choo from litigating any claims relating to her husband's death in the state courts.

Chick Kam Choo had asserted one claim under Singapore law and another under Texas state law. The district court did not resolve the merits of her Singapore claim in its 1980 order. *Id.* at 1688. In regard to this claim, the Court held that Exxon Corp. must present its pre-emption argument to the Texas state courts. *Id.* at 1691. The Court reasoned that "when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek a resolution of that issue by the state court." *Id.*

In contrast to the Singapore law claim, the validity of the claim asserted under Texas state law was adjudicated in the original action. *Id.* The Court held that the injunction was permissible insofar as it enjoined the state courts from considering this claim. *Id.* at 1692. However, because the district court's injunction barring the state court proceedings was broader than necessary to protect or effectuate its judgment which dismissed Chick Kam Choo's lawsuit from federal court, the Court remanded the case for the entry of a more narrowly tailored order. *Id.*

178. *Id.* at 309.

179. *Id.* at 321.

180. *Id.*

181. *Id.* at 321-22.

182. *Id.* at 321.

contended, controls the international role of all courts in the United States.<sup>183</sup> Moreover, when the Fifth Circuit compared maritime to non-maritime commercial actors, the court said that non-maritime actors can do a huge volume of business in the United States without subjecting themselves to jurisdiction by simply avoiding territorial contacts.<sup>184</sup> Citing to *Asahi* specifically, the Fifth Circuit noted that despite a large number of sales, Asahi did not directly solicit business or make sales in the United States and therefore avoided jurisdiction.<sup>185</sup>

If the Fifth Circuit was able to identify the international context as the actual issue in *Asahi*, the Supreme Court had to have been aware that the true basis of its decision should have been and actually was foreign policy and its consequent implications and not personal jurisdiction per se. The Supreme Court refused to directly address this issue and relegated discussion of the international context to one paragraph.<sup>186</sup> Furthermore, the Supreme Court rejected the opportunity that presented itself to determine authorization of federal court personal jurisdiction over alien defendants based on the aggregate of national contacts.<sup>187</sup>

The Supreme Court should have approached *Asahi* as a question of jurisdiction in an international controversy.<sup>188</sup> The due process standard derived from *International Shoe* and its progeny should be refined for application in international cases. A new standard should require that United States courts use restraint in asserting long-arm jurisdiction over foreign defendants and that the defendant have closer connections with the forum than are necessary in domestic cases. Furthermore, the foreign defendant's contacts should be with the United States as a whole rather than with a particular, individual state.

A due process standard for jurisdiction over foreign defendants that looks to national contacts would serve important public policies.<sup>189</sup> First, such a test would permit United States courts to exercise jurisdiction to the fullest extent permitted under international law. Second, the test would provide a better method for dealing with foreign defendants whose contacts spread evenly, but sparsely, over a number of states. Third, consideration of national contacts and expectations about being required to litigate in United States courts would provide a reasonably well-tailored measure of inconvenience to foreign defendants. Such a national contacts test would bring United States courts into accord with international law and foreign relations, for purposes of which the separate identities of the State are irrelevant.<sup>190</sup>

*Asahi* may have some small impact as an indication of the Supreme Court's broadening view of personal jurisdiction. The decision may have greater significance, however, for what the Supreme Court did not do. Once again, the Court refused to

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183. *Id.*

184. *Id.*

185. *Id.*

186. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 107 S. Ct. at 1033.

187. *Id.*

188. See generally Born, *Reflections*, *supra* note 123, 34-44.

189. *Id.* at 37-38.

190. *Id.* at 36.

address the issue of personal jurisdiction in international controversies. Until the Court does, confusion will reign among lower courts who will continue to apply an inappropriate domestic due process standard. The confusion “disserves the goals of fairness, sound judicial administration, and friendly international relations.”<sup>191</sup>

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191. *Id.* at 1.

